

Okinawa Dugong v. Gates, [543 F. Supp. 2d 1082 \(N.D. Cal. 2008\)](#).

Location: Outside of the United States - Okinawa, Japan

Applicable Laws: [National Historic Preservation Act](#) (NHPA) [16 U.S.C. §§ 470a et seq.](#)

Where Laws Apply: *National Historic Preservation Act*: Requires federal agencies to consider the effects of their undertakings on historic properties wherever located, including outside the United States. Section 110 (16 U.S.C. § 470h-2) sets out the broad responsibilities of Federal agencies to ensure that historic preservation is fully integrated into the ongoing programs of all federal agencies. Section 106 requires Federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation with a reasonable opportunity to comment. In addition, Federal agencies are required to consult on the effects of their undertakings on historic properties with State Historic Preservation Officers, Tribal Historic Preservation Officers, Indian tribes (including Alaska Natives), and Native Hawaiian Organizations. (Section 106, 16 U.S.C. § 470f). Section 402 requires Federal agencies to take into account the adverse effects of their undertakings outside of the United States on sites inscribed on the World Heritage List or on the foreign nation's equivalent of the National Register for the purpose of avoiding or mitigating adverse effects. 16 U.S.C § 470a-2.

Holding: Section 402 of the NHPA requires the head of the Federal agency having direct or indirect authority over a project must themselves take into account, as they would under Section 102 of the NHPA, the effects on property located on a foreign nation's equivalent of the National Register; it is not enough to allow the foreign country alone to consider the effects of the project.

General Facts:

The dugong is an herbivorous marine mammal in the same family as the manatee. The Okinawa dugong is a small, isolated population of the dugong species found in the waters off the eastern coast of Okinawa. The animal is central to the creation mythology, folklore, and rituals of traditional Okinawan culture. In Japan, the Okinawa dugong is a protected "natural monument" under the country's "Law for the Protection of Cultural Properties." The United States lists the dugong as "endangered" under the Endangered Species Act. [16 U.S.C. § 1531](#).

In 1997, the U.S. Department of Defense (DOD) released a document requiring that the Marine Corps Air Station Futenma be replaced by a sea-based facility in Henoko Bay. Henoko Bay is located in the northeastern part of Okinawa Prefecture, near the current location of Camp Schwab. According to a [2002 United Nations Environmental Programme Report](#), the construction of a military base near Henoko could destroy the remaining dugong habitat in Okinawa, endangering the small population.

Procedural Posture:

In 2003, the plaintiffs (the Okinawa dugong, American and Japanese environmental groups and three Japanese citizens) filed their case in the United States District Court, Northern District of California against Donald H. Rumsfeld, U.S. Secretary of Defense, and the United States DOD, alleging defendants failed to comply with the Administrative Procedure Act (APA) and the NHPA. *Dugong v. Rumsfeld*, [2005 WL 522106 \(N.D. Cal. March 2, 2005\)](#). In March of 2005, the district court issued an order addressing the narrow issue of whether the NHPA applies to the circumstances in the case and withheld judgment on other issues.

The court held that the Okinawa dugong is “property” protected under Japan’s equivalent of the National Register and therefore the DOD was required to follow the requirements of NHPA Section 402. The plaintiffs filed an amended complaint in 2006 to address the issues upon which judgment was withheld in the 2005 decision: (1) whether the defendants’ activities relating to the Futenma Replacement Facility constituted an undertaking; (2) if so, whether they directly or adversely affect the dugong; and (3) whether DOD has taken these potential effects into consideration. The defendants filed an answer shortly thereafter and parties filed cross-motions for summary judgment on the issue of whether defendants have “taken into account” the effects of the Futenma Replacement Facility on the dugong, as required under Section 402 of the NHPA.

Holding and Reasoning:

In 1980, the NHPA was amended to implement the United States’ obligations under the Convention Concerning Protection of World Cultural and National Heritage (“World Heritage Convention”). The amendment, Section 402, governs taking outside of the United States and states:

Prior to the approval of any Federal undertaking outside the United States which may directly or adversely affect a property which is on the World Heritage List or on the applicable country’s equivalent of the National Register, the head of a Federal Agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for the purposes of avoiding or mitigating any adverse effects.

16 U.S.C. § 470a-2.

In *Dugong v. Rumsfeld*, [2005 WL 522106 \(N.D. Cal. 2005\)](#), the dugong was established as “property” on Japan’s equivalent to the National Register of Historic Places. Thus, the first issue the court addressed was whether the DOD’s actions moving the military base constituted a federal “undertaking” and, if so, whether the undertaking may directly or adversely affect the dugong.

Defendants conceded that the project to design, construct, relocate and operate the Futenma Replacement Facility was a federal “undertaking.” The court then looked to whether the

undertaking had the potential to directly or adversely affect the dugong. It was undisputed by the parties that Henoko Bay is a dugong habitat and the court found that the construction and operation of a military facility in the Bay could have potential adverse effects on the dugong. Therefore under section 402 of the NHPA, the DOD was required to take into account the effects of the undertaking on the dugong.

The meaning of “take into account” was an issue of first impression for the court. The court determined from the plain language of section 402 and express legislative purpose, that the “take into account” process:

[A]t a minimum, must include (1) identification of protected property, (2) generation, collection, consideration, and weighing of information pertaining to how the undertaking will affect the historic property, (3) a determination as to whether there will be adverse effects or no adverse effects and (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects.

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When section 402 was added to the NHPA, Congress used the same “take into account” phrase as in Section 106. The natural presumption is that by using the same words, Congress intended them to have the same meaning. (*Environmental Defense v. Duke Energy Corp.* [549 U.S. 561 \(2007\)](#)). The court also considered that when Congress added section 402 to the NHPA, the Advisory Council on Historic Preservation had already established regulations to assist federal agencies with determining what was needed to satisfy the “taking into account” requirement of section 106. The court believed that had Congress not desired the same standard of “taking into account” for both sections 106 and 402, Congress would have explicitly stated so.

In considering whether the DOD complied with its requirements to take into account the effects of the Futenma Replacement Facility project on the dugong, the court determined that it was insufficient to simply have the Japanese government consider the dugong in their consideration of where to allow the DOD to build the Futenma Replacement Facility project. The court held that Section 402 of the NHPA is clear on its face in assigning the obligation to the “*head of the federal agency having direct or indirect jurisdiction over the project.*” It is not only that the effects are taken into account but by *whom* they are taken into account. The court found that no single DOD official with any level of responsibility over the Futenma Replacement Facility project had taken into account the effects of the Futenma Replacement Facility project on the dugong. Therefore, the court held that the DOD violated the NHPA.